

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSHUN MONTELL ROSAS,

Defendant-Appellant.

UNPUBLISHED

June 19, 2007

No. 267866

Saginaw Circuit Court

LC No. 05-025955-FC

Before: Kelly, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, armed robbery, MCL 750.529, two counts of possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b, assault with the intent to murder, MCL 750.83, and resisting and obstructing a police officer, MCL 750.81d. The trial court sentenced defendant to serve two years in prison for each of the felony-firearm convictions, 15 months to 24 months in prison for the resisting and obstructing conviction and 18 to 30 years in prison each for the conspiracy to commit armed robbery, armed robbery and assault with the intent to murder convictions. The sentences for the felony-firearm convictions and the resisting and obstructing conviction are to be served concurrently to each other but prior to the remaining sentences, which are concurrent to each other. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence from which a jury could conclude beyond a reasonable doubt that he conspired with Nicholas Moncivais to commit armed robbery. Therefore, defendant further argues, the trial court erred in refusing to grant defendant's motion for a directed verdict at the close of the prosecution's proofs. We disagree.

This Court reviews de novo a trial court's decision on a motion for a directed verdict. *People v Martin*, 271 Mich App 280, 319; 721 NW2d 815 (2006). In reviewing the trial court's decision, this Court examines the evidence in the light most favorable to the prosecution to determine whether the evidence "could persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* at 319-320.

The Standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of the review is the same whether the evidence is direct or

circumstantial. ““Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). [*People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).]

In order to convict defendant of conspiracy, the prosecution had to prove that defendant intended to combine with at least one other person and did so with the intent to accomplish an illegal objective. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). The prosecutor need not provide direct proof of the parties’ intent to combine to accomplish an illegal act. *People v Justice (After Remand)*, 454 Mich 334, 345-346; 562 NW2d 652 (1997). Rather, the nature of the conspiracy may be established by inferences “derived from the circumstances, acts, and conduct of the parties.” *Id.* In the present case, there was sufficient evidence from which a rational jury could conclude that defendant conspired with Moncivais to accomplish the armed robbery.

At trial, an officer testified that, on the night of the armed robbery, he observed a white Jimmy parked on the side of the road near the site of the robbery with its emergency lights flashing. The officer further testified that he pulled around to see if the driver needed assistance. The officer stated that the driver, who he later learned was Moncivais, told him that the Jimmy would not stay running and that he had already arranged for help. Less than one minute after leaving the location where the Jimmy was parked, the officer received a dispatch regarding an armed robbery at a car wash near the location where the Jimmy had been parked. The officer said he returned to the location, but the Jimmy was no longer there. Testimony also established that Moncivais and defendant were friends and that the Jimmy belonged to Moncivais’ mother. In addition, officers found items related to the robbery in the Jimmy, which was parked at Moncivais’ residence, approximately 15 minutes after the robbery. Finally, there was testimony that the Jimmy had had engine trouble in the recent past, but that the engine had been repaired and was in running condition at the time of the robbery.

Based on this evidence, a rational jury could conclude that defendant escaped from the scene of the robbery in Moncivais’ mother’s Jimmy. In addition, the testimony clearly established that Moncivais was with the Jimmy shortly before the armed robbery occurred. Hence, a rational jury could conclude that Moncivais was waiting for defendant and drove defendant away from the scene. Further, a rational jury could conclude that Moncivais deliberately misled the officer who stopped to assist him because he knew defendant was robbing the car wash and had agreed to assist defendant in that robbery. Consequently, there was sufficient evidence from which a rational jury could conclude that defendant had conspired with Moncivais to rob the car wash.

Defendant next argues that the trial court erred when it scored offense variable (OV) 8 at 15 points. Specifically, defendant contends that the prosecution failed to prove by a preponderance of the evidence that defendant asported a victim to a place of greater danger or held a victim captive beyond the time necessary to commit the crime. We disagree. Even assuming that the preponderance standard applies to the calculation of sentencing variables, see *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), we conclude that a preponderance of the evidence established that defendant asported at least one victim to a place of greater danger or held captive beyond the time necessary to commit the crime. Therefore, there was no error warranting resentencing.

Because defendant committed his offenses after January 1, 1999, the trial court was required to sentence defendant according to the sentencing guidelines. MCL 769.34(2). Under the sentencing guidelines, the trial court had to score each of the offense variables applicable to defendant's crimes. MCL 777.21(1)(a). Because defendant's crimes were offenses against persons, the trial court was required to score OV 8. MCL 777.22(1). A trial court must score OV 8 at 15 points if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). If no victim was asported or held captive, OV 8 must be scored at zero. MCL 777.38(1)(b).

In the present case, there was evidence that defendant directed the two victims at gun point to move out of a common area that was visible to the public and into a mechanical room, which was not visible to the public. By moving the victims to a concealed location, defendant placed the victims in a position where he could more readily commit further crimes against the victims. Hence, a preponderance of the evidence demonstrated that defendant asported at least one victim to a place of greater danger. See *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003) (noting that moving victims to a location where they were secreted from observation by others is sufficient to score OV 8). Likewise, after the door to the mechanical room was closed, the victim inside the mechanical room stated she heard a shot and was too scared to leave the mechanical room. Consequently, even though the mechanical room was not locked, there was adequate evidence to demonstrate by a preponderance of the evidence that defendant held that victim captive longer than necessary to commit the robbery. There was no error in the scoring of OV 8.

Finally, defendant argues that the trial court erred when it declined his request to have the jury instructed that it could convict defendant of the lesser-included offense of felonious assault rather than assault with the intent to murder. We disagree.

A defendant is entitled to have a requested instruction on a necessarily included lesser offense "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). However, felonious assault is not a lesser-included offense of assault with the intent to murder. *People v Otterbridge*, 477 Mich 875; 721 NW2d 595 (2006). Therefore, the trial court did not err in refusing to instruct the jury that it could convict defendant of felonious assault as a lesser-included offense of assault with the intent to murder.

There were no errors warranting relief.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Michael R. Smolenski